



Frequently Asked USERRA Questions

Does USERRA protect against discrimination in initial hiring decisions?

Yes. A person, institution, organization, or other entity that has denied initial employment to an individual is in violation of USERRA's anti-discrimination provisions. Under the act, an employer need not actually employ an individual to be his or her "employer," if initial employment was denied on the basis of the individual's military affiliation application for membership, performance of service, application for service, or obligation for service in the uniformed services. For example, if the individual has been denied initial employment because of his or her obligations as a member of the Guard or Reserve, the company or entity denying employment is an employer for purposes of USERRA. Similarly, if an entity withdraws an offer of employment because the individual is called upon to fulfill an obligation in the uniformed services, the entity withdrawing the employment offer is an employer for purposes of USERRA.

What criteria must the employee meet to be eligible under USERRA for reemployment after military service?

In general, if the employee has been absent from a position of civilian employment by reason of service in the uniformed services, he or she will be eligible for reemployment under USERRA by meeting the following criteria:

The employer had advance notice of the employee's military obligation;

The employee has been away from this employer five years or less due to military obligations (excluding exemptions);

The employee returns to work in a timely manner as defined under USERRA; and,

The employee has not been separated from uniformed services with a disqualifying discharge or under other than honorable conditions.

What are the guidelines USERRA provides for the employee to return to work after completion of military service?

To be eligible for protection under USERRA, the service member must report back to work or apply for reemployment within the following guidelines:

1-30 days of service

Report next scheduled work day after safe travel and 8 hours rest

31-180 days of service

Apply within 14 days after completion of service

181+ days of service

Apply within 90 days after completion of service



What types of military service are covered by USERRA?

USERRA's definition of "service in the uniformed services" covers all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war. Although most often understood as applying to Guard and Reserve military personnel, USERRA also applies to persons serving in the active components of the Armed Forces and the National Disaster Medical System (NDMS).

Can an employer discriminate based on past or present military service?

No. An employer must not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment to an individual on the basis of his or her military service. Additionally, an employer cannot retaliate against an individual by taking any adverse employment action against him or her because the individual has taken an action to enforce a protection afforded any person under USERRA, testified or otherwise made a statement in or in connection with a proceeding under USERRA, assisted or participated in a USERRA investigation or exercised a right provided for by USERRA.

What types of discharge or separation from uniformed service will make the employee ineligible for reemployment rights under USERRA?

Reemployment rights are terminated if the employee is:

Separated from uniformed service with a dishonorable or bad conduct discharge;

Separated from uniformed service under other than honorable conditions, as characterized by regulations of the uniformed service;

A commissioned officer dismissed by sentence of a general court-martial; in commutation of a sentence of a general court-martial; or, in time of war, by order of the President;

A commissioned officer dropped from the rolls due to absence without authority for at least three months; separation by reason of a sentence to confinement adjudged by a court-martial; or, a sentence to confinement in a Federal or State penitentiary or correctional institution.

What position is the employee entitled to upon reemployment?

As a general rule, the employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to military service. This position is known as the escalator position. The principle behind the escalator position is that, if not for the period of military service, the employee could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events. The escalator principle requires that the employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perks that he or she would have attained if not for the period of service.



Does the reemployment position include elements such as seniority, status, and rate of pay?

Yes. The reemployment position includes the seniority, status, and rate of pay that an employee would ordinarily have attained in that position given his or her job history, including prospects for future earnings and advancement. The employer must determine the seniority rights, status, and rate of pay as though the employee had been continuously employed during the period of service.

The seniority rights, status, and pay of an employment position include those established (or changed) by a collective bargaining agreement, employer policy, or employment practice. In particular, the employee's status in the reemployment position could include opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location. If an opportunity for promotion, or eligibility for promotion that the employee missed during service is based on a skills test or examination, then the employer should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination.

Can the application of the escalator principle result in adverse consequences when the employee is reemployed?

Yes. USERRA does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status.

Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.

Does USERRA cover independent contractors?

No. USERRA does not provide protections for independent contractors. In deciding whether an individual is an independent contractor, the following factors need to be considered:

- 1.The extent of the employer's right to control the manner in which the individual's work is to be performed;
- 2.The opportunity for profit or loss that depends upon the individual's managerial skill;
- 3.Any investment in equipment or materials required for the individual's tasks, or his or her employment of helpers;
- 4.Whether the service the individual performs requires a special skill;
- 5.The permanence of the individual's working relationship; and,
- 6.Whether the service the individual performs is an integral part of the employer's business.

No single one of these factors is controlling, but all are relevant to determining whether an individual is an employee or an independent contractor.



Is there a limit on the total amount of service in the uniformed services that an employee may perform and still retain reemployment rights with the employer?

Yes. In general, the employee may perform service in the uniformed services for a cumulative period of up to five (5) years, under the current statute, and retain reemployment rights with the employer

Are there any exceptions to USERRA's five-year service limit?

USERRA creates the following exceptions to the five-year limit on service in the uniformed services:

Service that is required beyond five years to complete an initial period of obligated service. Some military specialties require an individual to serve more than five years because of the amount of time or expense involved in training. If the employee works in one of those specialties, he or she has reemployment rights when the initial period of obligated service is completed.

If the employee was unable to obtain orders releasing him or her from service in the uniformed services before the expiration of the five-year period, and the inability was not the employee's fault.

Service performed to fulfill periodic Guard and Reserve training requirements and includes service performed to fulfill additional training requirements determined and certified by a proper military authority as necessary for the employee's professional development, or to complete skill training or retraining. This includes weekend drills and annual training.

Service performed in a uniformed service if he or she was ordered to or retained on active duty under the following circumstances: Involuntary active duty of a military retiree;

Involuntary active duty in wartime;

Retention on active duty while in captive status;

Involuntary active duty during a national emergency;

Involuntary active duty for an operational mission, involuntary retention on active duty of a critical person during time of crisis or other specific conditions;

Involuntary active duty by the Coast Guard Reserve for natural or man-made disasters;

Service performed in a uniformed service if the employee was ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned.

What is the employee's status with his or her civilian employer while performing military service?

The employee is deemed to be on furlough or leave of absence from the civilian employer while performing military duty. In this status, the employee is entitled to the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay that are on furlough or leave of absence. Entitlement to these non-seniority rights and benefits is not dependent on how the employer characterizes the employee's status during a period of service.

For example, if the employer characterizes the employee as "terminated" while performing military service, this characterization cannot be used to avoid USERRA's requirement that the employee be deemed on furlough or leave of absence, and therefore entitled to the non-seniority rights and benefits generally provided to employees on furlough or leave of absence.



Which non-seniority rights and benefits is the employee entitled to during a period of service?

The non-seniority rights and benefits to which an employee is entitled during a period of service are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of employment and those established after employment began. They also include those rights and benefits that become effective during the employee's period of service and that are provided to similarly situated employees on furlough or leave of absence.

If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs military service. As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.

What health plan coverage must the employer provide for the employee under USERRA?

If the employee has coverage under a health plan in connection with his or her employment, the plan must permit the employee to elect to continue the coverage for a certain period of time as described below:

When the employee is performing military service, he or she is entitled to continuing coverage for himself or herself (and dependents if the plan offers dependent coverage) under a health plan provided in connection with the employment.

The plan must allow the employee to elect to continue coverage for a period of time that is the lesser of:

1. The 24-month period beginning on the date on which the employee's absence for the purpose of performing service begins; or,
2. The period beginning on the date on which the employee's absence for the purpose of performing service begins, and ending on the date on which he or she fails to return from service or apply for a position of reemployment.

USERRA does not require the employer to establish a health plan if there is no health plan coverage in connection with the employment, or, where there is a plan, to provide any particular type of coverage.

USERRA does not require the employer to permit the employee to initiate new health plan coverage at the beginning of a period of service if he or she did not previously have such coverage.

In a multi-employer health plan, how is liability allocated for employer contributions and benefits arising under USERRA's health plan provisions?

Liability under a multi-employer plan for employer contributions and benefits in connection with USERRA's health plan provisions must be allocated either as the plan sponsor provides, or, if the sponsor does not provide, to the employee's last employer before his or her service. If the last employer is no longer functional, liability for continuing coverage is allocated to the health plan.



How does USERRA protect an employee's pension benefits?

On reemployment, the employee is treated as not having a break in service with the employer or employers maintaining a pension plan, for purposes of participation, vesting and accrual of benefits, by reason of the period of absence from employment due to or necessitated by service in the uniformed services.

If the employee is employed with his or her pre-service employer, is the employee's pension benefit the same as if he or she had remained continuously employed?

In a non-contributory defined benefit plan, where the amount of the pension benefit is determined according to a specific formula, the employee's benefit will be the same as though he or she had remained continuously employed during the period of service. In a contributory defined benefit plan, the employee is allowed to make up contributions in order to have the same benefit as if he or she had remained continuously employed during the period of service.

In a defined contribution plan, the benefit may not be the same as if the employee had remained continuously employed, even though the employee and the employer make up any contributions or elective deferrals attributable to the period of service, because the employee is not entitled to forfeitures and earnings or required to experience losses that accrued during the period or periods of service.

Is the employee entitled to any specific reemployment benefits if he or she has a disability that was incurred in, or aggravated during, the period of service?

Yes. A disabled service member is entitled, to the same extent as any other individual, to the escalator position he or she would have attained if not for military service. If the employee has a disability incurred in, or aggravated during, the period of service, the employer must make reasonable efforts to accommodate that disability and to help the employee become qualified to perform the duties of his or her reemployment position.

If the employee is not qualified for reemployment in the escalator position because of a disability after reasonable efforts by the employer to accommodate the disability, and to help the employee to become qualified, the employee must be reemployed in a position according to the following priority. The employer must make reasonable efforts to accommodate the employee's disability and to help him or her to become qualified to perform the duties of one of these positions:

1. A position that is equivalent in seniority, status, and pay to the escalator position;
2. A position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee's case, in terms of seniority, status, and pay. Note that a position that is the nearest approximation to the equivalent position may be a higher or lower position, depending on the circumstances.



Does USERRA provide the employee with protection against discharge?

Yes. If the employee's most recent period of service in the military was more than 30 days, he or she must not be discharged, except for cause, for:

180 days after the employee's date of reemployment if his or her most recent period of uniformed service was more than 30 days but less than 181 days; or for,

One year after the date of reemployment if the employee's most recent period of uniformed service was more than 180 days.

What constitutes cause for discharge under USERRA?

The employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons. In a discharge action based on conduct, the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was expressed or can be fairly implied, that the conduct would constitute cause for discharge. If, based on the application of other legitimate nondiscriminatory reasons, the employee's job position is eliminated, or the employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employer bears the burden of proving that the employee's job would have been eliminated or that he or she would have been laid off.

What options are available for conflict resolution issues concerning employment, reemployment, or other rights and benefits under USERRA?

In the event a conflict arises that an employee and employer are unable to resolve, ESGR's trained ombudsmen can provide informal mediation. Call ESGR's customer service center at 1-800-336-4590 to reach one of our trained ombudsmen.

If the service member or employer chooses to open a formal investigation regarding a USERRA violation, they may do so by contacting the Department of Labor.

Another option available would be to hire a private attorney.

Does USERRA require the employer to use a seniority system?

No. USERRA does not require the employer to adopt a formal seniority system. USERRA defines seniority as longevity in employment together with any employment benefits that accrue with, or are determined by, longevity in employment. In the absence of a formal seniority system, such as one established through collective bargaining, USERRA looks to the custom and practice in the place of employment to determine the employee's entitlement to any employment benefits that accrue with, or are determined by, longevity in employment.

Does an individual have rights under USERRA even if he or she is an executive, managerial, or professional employee?

Yes. USERRA applies to all employees. There is no exclusion for executive, managerial, or professional employees.



Which employees are covered by USERRA?

USERRA applies to all public, private and government employers in the United States, large and small. USERRA applies to foreign employers doing business in the United States and American companies operating in foreign countries, unless compliance would violate the law of the foreign country in which the workplace is located.

Is an application for reemployment required to be in any particular form?

An application for reemployment need not follow any particular format. The employee may apply verbally or in writing to the pre-service employer or to an agent or representative of the employer who has apparent responsibility for receiving employment applications. The application should indicate that the employee is returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but not required to identify a particular reemployment position in which he or she is interested.

Is the employee required to submit documentation to the employer in connection with the application for reemployment?

Yes, if the period of service exceeds 30 days and if requested by the employer to do so. If the employee submits an application for reemployment after completion of a period of service of more than 30 days, he or she must, upon the request of the employer, provide documentation to establish that:

The reemployment application is timely;

The employee has not exceeded the total time limit, currently five years, on the duration of service;

The employee's separation or dismissal from service was not disqualifying.

What documents satisfy the requirement that the employee establish eligibility for reemployment after more than thirty days of service?

Documents that satisfy the requirements of USERRA include the following:

DoD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty;

Copy of duty orders prepared by the facility where the orders were fulfilled and carrying an endorsement indicating completion of the described service;

Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority;

Certificate of completion from military training school;

Discharge certificate showing character of service;

Copy of extracts from payroll documents showing periods of service.

The types of documents necessary to establish eligibility for reemployment will vary from case to case. Not all of these documents are available or necessary in every instance to establish reemployment eligibility.



When is an employee entitled to be reemployed by his or her civilian employer?

The employer must promptly reemploy the employee when he or she returns from a period of service if the employee meets USERRA's eligibility criteria. "Prompt reemployment" means as soon as practical under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment. For example, prompt reinstatement after weekend Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employer may have to reassign or give notice to another employee who occupied the returning employee's position.

What seniority rights does an employee have when reemployed following a period of military service?

The employee is entitled to the seniority and seniority-based rights and benefits that he or she had on the date military service began, plus any seniority and seniority-based rights and benefits the employee would have attained if he or she had remained continuously employed.

Are Federal employees protected by USERRA?

Yes. Federal employees have the same USERRA rights and responsibilities as non-federal employees.

Federal employees can request assistance through ESGR or the Department of Labor/Veterans' Employment and Training Service (DOL/VETS). When appropriate, DOL/VETS can refer a case to the Office of Special Counsel or the Merit Systems Protection Board.

Must the employee give advance notice to his or her employer for a leave of absence due to military service?

Yes. The employee, or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify the employer that the employee intends to leave the employment position to perform military service. If the employee has more than one employer, each employer must be notified of the impending leave of absence due to military service.

USERRA regulations provide that an "appropriate officer" can give notice on the employee's behalf. An "appropriate officer" is a commissioned, warrant, or non-commissioned officer authorized to give such notice by the military branch concerned. The employee's notice to the employer may be either verbal or written. The notice may be informal and does not need to follow any particular format.

Although USERRA does not state how far in advance notice must be given to the employer, an employee should provide notice as far in advance as is reasonable under the circumstances. The Defense Department "strongly recommends advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when it is feasible to do so."

Is the employee required to get permission from his or her employer before leaving to perform military service?

No. The employee is not required to ask for or get his or her employer's permission to leave to perform military service. The employee is only required to give the employer notice of pending service.



Must the employee tell their employer prior to leaving that he or she will seek reemployment upon completion of military service?

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service.

Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.

How much must the employee pay in order to continue health plan coverage?

If the employee performs service in the uniformed service for fewer than 31 days, he or she cannot be required to pay more than the regular employee share, if any, for health plan coverage. If the employee performs service in the uniformed service for 31 or more days, he or she may be required to pay no more than 102% of the full premium under the plan, which represents the employer's share plus the employee's share, plus 2% for administrative costs. USERRA does not specify requirements for methods of paying for continuing coverage. Health plan administrators may develop reasonable procedures for payment, consistent with the terms of the plan.